Sabu Development Sdn Bhd v Kelik Anak Bayel

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–293 OF 2006-II
HAMID SULTAN JC
25 APRIL 2007

Administrative Law — Remedies — Declaration — Factors to consider when exercising discretion — Applicability of s 41 of the Specific Relief Act 1950

Civil Procedure— — Costs — Order against counsel personally — Purpose & effect of ordering costs to be borne by counsel personally

Civil Procedure — Declaration — Whether correct procedure in the circumstances — Whether presence of all interested and necessary parties necessary — Whether requirement under O 15 r 16 of the Rules of the High Court 1980 satisfied

The plaintiff vide originating summons sought, inter alia, a declaration that the Statutory Tribunal for Consumer Claims ('the TCC') created under s 85 of the Consumer Protection Act 1999 ('the Act') would be acting ultra vires the Act should the Tribunal hear cases where the subject matter involves contractual disputes arising from the purchase of 'real property'. The defendant in this case was the 'consumer' who had filed a claim with the TCC against the plaintiff for a contractual dispute involving the purchase of property and claimed for damages for late delivery and defective workmanship of a single storey terrace house purchased by the defendant. The plaintiff in seeking the declaration which involved the State, did not name the Government of Malaysia or serve the papers on the Attorney General when the subject matter of the suit involved the jurisdiction of the TCC under the Act. At the hearing of the originating summons, the plaintiff, inter alia, submitted that (a) the TCC lacked jurisdiction or was not vested with the jurisdiction to hear cases where the subject matter involved 'contractual disputes' arising from the purchase of 'real property' for the reason that a 'house' does not fall within the ambit of the definition of 'goods' and the defendant's claim was for liquidated damages and defective workmanship; (b) an action for a declaration may be begun by writ or an originating summons; (c) it was usual not to grant a declaration where there were alternative remedies available that were adequate and had not been exhausted unless difficult and doubtful questions of law are involved; (d) that since this case primarily involved the question of the construction of the Act, the originating summons is the most appropriate procedure to adopt.

Held, dismissing the originating summons with costs:

(1) The plaintiff has not made out a case to proceed without naming the TCC.

Further, declaratory relief is discretionary relief and not relief which can be sought as of right. Sine qua non for considering declaratory relief needs the presence of all interested and necessary parties as set out in O 15 r 16 of the RHC as the court deems fit. Only thereafter can the views of author PW Young become relevant. The matter does not end there. The plaintiff must also satisfy the requirements set out in the Specific Relief Act 1950 ('the SRA') because the Act specially deals with declaratory orders and decrees (see paras 5, 6).

(2) Under s 41 of the SRA, there is a need to seek 'further relief than mere declaration'. This is not a requirement under O 15 r 16 of the RHC. Declaratory orders cannot be granted when the strict requirement set out in this section is not satisfied. Further, it will appear that the literal reading of O 15 r 16 of the RHC will be ultra vires s 41 of the SRA (see paras 9, 10).

(3) Our courts have endorsed the criteria set out by PW Young in his book Declaratory Orders (2nd Edn) where he says that the criteria required before there can be a declaratory order are as follows: (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which usually referred to as 'standing' or 'locus standi'; (d) the controversy must be subject to the court's jurisdiction; (e) the defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims; (f) the issue must be ripe, ie, it must not be of academic interest hypothetical or one whose resolution would be of no practical utility (see para 9).

(4) Pure reliance on English authorities and books now (after 50 years of independence) in almost all cases will not reflect our legislative intention and scope of the relevant Acts. In my view, less dependence will pave way for independence in the development of law and legal jurisprudence. This is so because many of our legislative provisions are not applicable in England or other jurisdictions in the commonwealth. It is often unnecessary to rely on authorities when the Act and Rules are extremely clear. The plaintiff need only comply with the basic rules and statutory provisions to obtain the relevant relief. It is unnecessary as in this case to place heavy reliance on cases when the Act and Rules for declaratory relief are clear and self explanatory, and the discretion to grant the relief is vested in the courts (see para 11).

(5) The plaintiff has not satisfied the legal and procedural requirements and has taken much of court's time and on the facts of this case it can be said that the plaintiff's application is frivolous, vexatious and an abuse of the process of court. To avert such application, the solicitors must be asked to bear the costs as in doing so it will stand as a deterrent for filing an unmeritorious application and this will also be a step to reduce backlog of cases (see para 12).

[Bahasa Malaysia summary

Plaintif melalui saman pemula memohon, antara lain, perisytiharan bahawa Tribunal Berkanun untuk Tuntutan Pengguna ("TTP") yang diwujudkan di bawah seksyen 85 Akta Perlindungan Pengguna 1999 (Akta) bertindak melangkaui Akta jika Tribunal yang mendengar kes-kes dimana perkara yang melibatkan pertikaian kontraktual

ekoran daripada pembelian "harta tanah". Defendan dalam kes ini adalah "pengguna" sendiri yang telah memfailkan tuntutan dengan TTP terhadap plaintif untuk pertikaian kontraktual melibatkan pembelian harta dan menuntut bagi gantirugi kerana kelewatan penyerahan dan kecacatan mutu kerja sebuah rumah teres setingkat yang dibeli oleh Defendan. Plaintif semasa memohon perisytiharan yang turut melibatkan Negeri, tidak menamakan Kerajaan Malaysia atau meyerahkan kertas-kertas kepada Peguam Negara semasa perkara guaman melibatkan bidangkuasa TTP dibawah Akta tersebut. Semasa pendengaran Saman Pemula, plaintif, antara lain, berhujah bahawa (a) kekurangan bidangkuasa TTP atau tiada hak dalam bidangkuasa bagi mendengar kes-kes apabila perkara melibatkan "pertikaian kontraktual" bertitik tolak dari pembelian "harta tanah" bagi tujuan bahawa 'rumah' tidak jatuh ke dalam lingkungan definisi "barangan-barangan" dan tuntutan defendan adalah untuk ganti rugi yang telah ditetapkan dan kecacatan mutu kerja (b) tindakan untuk perisytiharan hanya boleh dimulakan dengan writ atau saman pemula (c) adalah menjadi kebiasaan untuk tidak memberikan perisytiharan dimana jika remedi-remedi alternatif masih ada dan mencukupi serta masih tidak kehabisan kecuali melibatkan persoalan perundangan yang menyusahkan dan meragukan (d) Memandangkan kes ini pada mulanya melibatkan persoalan penafsiran Akta, saman pemula adalah prosedur yang sesuai untuk digunapakai.

Diputuskan, menolak saman pemula dengan kos:

(1) Plaintif tidak megemukakan sebarang kes untuk diteruskan jika tidak menamakan TTP. Selanjutnya, relief perisytiharan adalah relief berdasarkan budibicara dan bukannya sesuatu yang dipohon semata-mata kerana hak. Sine qua non bagi pertimbangan relief perisytiharan memerlukan kehadiran kesemua pihak-pihak yang berkepentingan dan berkeperluan sebagaimana dinyatakan dalam Aturan 15 Kaedah 16 KMT 1980 sebagaimana mahkamah menganggapnya sesuai. Hanya selepas itu, barulah pandangan P.W. Young menjadi releven. Perkara ini tidak akan terhenti di situ sahaja. Plaintif hendaklah memenuhi keperluan seperti dinyatakan dalam Akta Relif Spesifik 1950 (ARS 1950) kerana Akta ini khususnya bersangkut paut dengan perintah-perintah perisytiharan dan dekri-dekri.

(2) Di bawah s 41 Akta Relief Spesifik, terdapat keperluan untuk mendapatkan 'relief selanjutnya daripada hanya perisytiharan'. Ini bukanlah keperluan di bawah A 15 K 16. Perintah-perintah perisytiharan tidak boleh diberikan apabila terdapat keperluan ketat dikeluarkan di bawah seksyen ini tidak dipenuhi. Selanjutnya, ia akan menampakkan bahawa pembacaan berasaskan makna sebenar A 15 K 16 KMT 1980 akan melangkaui seksyen 41 ARS 1950.

(3) Mahkamah ini telah mengindoskan kriteria yang dinyatakan oleh P.W Young dalam bukunya bertajuk 'Declaratory Orders' Edisi Kedua dimana beliau menyatakan bahawa kriteria yang diperlukan sebelum adanya perintah perisytiharan adalah seperti berikut: (a) terdapat kewujudan kontrovesi antara pihak-pihak (b) prosiding-prosiding melibatkan satu 'hak' (c) prosiding-prosiding hendaklah dibawa oleh seseorang yang mempunyai kepentingan yang betul dan ketara dalam mendapatkan perintah, yang selalunya dirujuk sebagai 'terbuka' atau 'kedudukan disisi undang-undang' (d)

kontrovesi adalah tertakluk kepada bidangkuasa mahkamah (e) defendan adalah seseorang yang mempunyai kepentingan yang betul dan ketara dalam menentang tuntutan plaintif (f) isu hendaklah matang, iaitu ia bukanlah andaian kepentingan akademik atau resolusi yang mana penggunaannya adalah tidak praktikal.

(4) Kebergantungan asli kepada otoriti-otoriti Inggeris dan buku-buku pada masa sekarang (50 tahun selepas merdeka) dalam hampir semua kes-kes tidak mencerminkan niat perundangan dan ruang tempat akta-akta relevan. Pada pendapat saya, ketidakbergantungan akan memberi ruang bagi memerdekakan pembangunan perundangan dan undang-undang jurisprudens. Ia adalah kerana peruntukkan-peruntukkan badan perundangan tidak terpakai di England atau dalam bidangkuasa komanwel. Ia selalunya tidak bermakna jika kebergantungan kepada otoriti-otoriti apabila Akta dan Kaedah-kaedah amat jelas. Plaintif hanya perlu mematuhi kaedah-kaedah asas dan peruntukkan berkanun untuk mendapatkan relief yang sesuai. Ia adalah agak keterlaluan kerana dalam kes ini meletakkan kebergantungan yang besar ke atas kes-kes bila Akta dan Kaedah-keaedah untuk perisytiharan relief adalah jelas dan adalah melalui penjelasan sendiri, dan budibicara untuk memberikan relief adalah terletak pada mahkamah-mahkamah.

(5) Plaintif tidak memenuhi perundangan dan keperluan prosedur dan telah mengambil banyak masa mahkamah ke atas fakta-fakta kes ini bolehlah dikatakan bahawa permohonan ini adalah remeh, meyusahkan dan merupakan satu penyalahgunaan proses mahkamah. Bagi mengalihkan permohonan, peguam-peguam mesti diarahkan untuk menanggung kos-kos kerana dengan berbuat demikian ia akan dapat mencegah dari pemfailan permohonan tidak bermerit dan]

Notes

For cases on correct procedure in the circumstances of declaration, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2359–2360.

For cases on order against counsel personally, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2012–2013.

Cases referred to

Kathamar Nachiyar v Dorasingha (1875) 21A 169 (refd)

Kho Poh Teck v Digi Telecommunications Sdn Bhd [2006] 6 MLJ 349 (refd)

Khoo Kim Hock, Re [1974] 2 MLJ 29 (refd)

Palmerston Holdings Sdn Bhd v Chong Siew Eng [2007] 7 CLJ 56 (refd)

Phileoallied Bank (Malaysia) Bhd v Sakuntalathevy Manickavasagam [2007] 1 MLJ 581 (refd)

Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor [2007] 1 MLJ 626 (refd)

Tribunal Tuntutan Pembeli Rumah v Westcourt Corporation Sdn Bhd & Other Appeals [2004] 3 MLJ 17 (refd)

United Overseas Bank Limited v Ting Kai Hoon [1998] 1 LNS 38 (refd)

Westcourt Corporation Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah [2006] 1 MLJ 339 (refd)

Legislation referred to

Consumer Protection Act 1999 ss 3, 85, 99, 113
Housing Developers (Control and Licensing) (Amendment) Act 1966 s 16B
Rules of the High Court 1980 O 15 r 16
Specific Relief Act 1950 s 41

Victor Ng (Tang & Partners) for the plaintiff.
Defendant not present.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiff's originating summons seeking, inter alia, a declaration that the Statutory Tribunal for Consumer Claims ('the TCC') created under s 85 of the Consumer Protection Act 1999 ('the Act') would be acting ultra vires the Act should the Tribunal hear cases where the subject matter involves contractual disputes arising from the purchase of 'real property'.

[2] The defendant in this case is not the 'Statutory Tribunal for Consumer Claims' (the TCC) or its representative who the law authorises to sue or be sued. The defendant is the 'consumer' who seeks protection under the Act. The defendant was not present or represented in this case. The plaintiff in an unusual manner is seeking a declaration involving the State without naming the Government of Malaysia or serving the papers on the Attorney General when the subject matter of the suit involves jurisdiction of the TCC under the Act.

[3] The plaintiff in this case is the developer and the defendant is a purchaser of a single storey terrace house ('the property'). The defendant had filed a claim with the TCC against the plaintiff for a contractual dispute involving the purchase of the property and claiming for damages for late delivery and defective workmanship.

[4] The plaintiff, inter alia, submits as follows:

(a) The TCC lacks jurisdiction or is not vested with the jurisdiction to hear cases where the subject matter involves 'contractual disputes' arising from the purchase of 'real property' for the reason that a 'house' does not fall within the ambit of the definition of 'goods' and the defendant's claim is for liquidated damages and defective workmanship.

(b) The plaintiff had raised the issue with the TCC whether the TCC is vested with the jurisdiction to hear the defendant's claim and had requested the TCC to exercise its discretion to cause a reference to be made to the High Court of Sabah and Sarawak on a question of law under s 113 of the Act. The TCC had orally informed the plaintiff that it refused to exercise its discretion under s 113 of the Act. The plaintiff has no other alternative remedy but to seek for a declaration to clarify the status of the law on the question of law raised in this application.

(c) The TCC had informed the parties that they can submit on the question of jurisdiction at the hearing of the claims and the TCC would make the

necessary order thereafter. The plaintiff's managing director had been orally informed by the TCC that it had decided at its own volition to postpone all cases against the plaintiff indefinitely until such time when the High Court delivers its ruling on the issue of jurisdiction. No order or ruling was made by the TCC at the time as to whether they have the jurisdiction to hear cases where the subject matter is that of 'real property'.

(d) An action for a declaration may be begun by writ or an originating summons. Proceedings in which the sole or principal question at issue is one of construction of any written law are appropriate to be taken by originating Summons. Furthermore, s 41 of the Specific Relief Act 1950 ('the SRA') prohibits the grant of a declaration if they are other alternative remedies and those remedies have not been exhausted. In *Phileoallied Bank (Malaysia) Bhd v Sakuntalathevy Manickavasagam* [2007] 1 CLJ 72, the court stated:

> In *Sungai Wangi Estate v Uni* [1975] 1 LNS 172 Eusoffe Abdoolcader J (as he then was) said:
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> Of all the Rules of the High Court 1957 (the predecessor of the Rules of the High Court 1980), concerning declaratory relief, O 25 r 5 (now O 15 r 16 of the Rules of the High Court 1980) has the widest application as it provides that where a declaration is asked for, it may not be objected to on the ground that no consequential relief is or could be claimed. It does not prescribe any special procedure, or is it limited to any specific matter. It applies to all proceedings for a declaration - whether instituted by writ or originating summons, and whether brought under a particular statute or under the general declaratory jurisdiction of the court. Where no special procedure is laid down, the claim for a declaratory judgment is brought by way of a writ. In certain cases, however, specified by legislation, a declaration may be sought on originating summons. Proceedings in which the sole or principal question at issue is, or is likely to be, one of the construction of any written law or of any deed, will, contract, or other document, are appropriate to be taken by originating summons. This is specifically provided for by O 54A of the Rules of the High Court. The court may also make declarations by way of originating summons in matters relating to express trusts or the administration of the estates of deceased persons under the provisions of O 55 r 3 of the Rules of the High Court.

(e) It is usual not to grant a declaration where there are alternative remedies available and adequate and had not been exhausted unless difficult and doubtful questions of law are involved. This principle is codified in the proviso to s 41 of the SRA. The proviso reads:

> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

(f) That since this case primarily involves the question of the construction of the Act, the originating summons is the most appropriate procedure to adopt. It is evident that the plaintiff simply has no other alternative remedies under the circumstances but to seek a clarification on the point of law raised in this originating summons for a declaration on the question of whether the tribunal is vested with the jurisdiction to hear the defendant's case.

(g) It is established law that the essential ingredients that must exist before the relief of a declaration is granted are as follows; (a) there must exist a controversy

between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the court's jurisdiction; (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility. In *Kho Poh Teck v Digi Telecommunications Sdn Bhd* [2006] 2 CLJ 957, where the learned Judicial Comissioner, Tuan David Wong Dak Wah (as he then was), had succinctly addressed and summarised the principles of the declaratory judgment, where he held that:

> I shall now deal with issue 1. The power of the court to grant a declaration is provided for in O 15 r 16 of the Rules of the High Court 1980 ('RHC') and s 41 of the Specific Relief Act which respectively provide as follows:
>
> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief: Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
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> In the case of *Karpal Singh v Sultan of Selangor* [1987] 2 CLJ 342; Abdul Hamid Omar CJ set out the guidelines of the courts on declaratory relief:
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> The plaintiff has by his originating summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose (see *Mellstrom v Garner & Ors* [1970] 2 All ER 9). The learned Attorney-General has referred to a textbook on Declaratory Orders (2nd Ed) by PW Young, on the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the Court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.
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> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought (*The Russian Commercial & Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438 at 448 per Lord Dunedin).
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> At this juncture, I would refer to *Cox v Green* [1966] 1 Ch 216 where it was held 'that on its true construction, RSC O 15 r 17 (O 15 r 16 of our RHC) was limited to an action or proceeding in which the grant of the declaration sought would not be contrary to the accepted principles on which the Court exercised its jurisdiction, one of those principles being that the Court would not make a declaration in a dispute which was not a justiciable dispute.
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> I would also refer to the case of *Lim Cho Hock v Government of the State of Perak & Ors* [1980] 2 MLJ 149 where the Court held that the Court's power to make declaratory judgments is confined to matters justiciable in the Courts, and the

A binding declarations which it could make under O 15 r 16 of the Rules of the High Court 1980are limited to legal or equitable rights and do not extend to moral, social or political matters (see also s 41 Specific Relief Act 1950).

Strictly it is a discretionary relief and the discretion is to be exercised judicially consistent with accepted principles. In the exercise of its discretion the Court shall have regard to the facts and circumstances of each particular case before it decides to grant a declaration.

Further the court's power to grant a declaration is a discretionary one without limits. In the case of *Tengku Mariam Binte Tengku Sri Wa Raja & Anor v Commissioner For Religious Affairs, Terengganu & Ors* [1968] 1 LNS 156; [1969] 1 MLJ 110 at 112, Wan Suleiman J adopted the dicta in *Barnard v National Dock Labour Board* [1953] 2QB 18 at p 41 wherein it was stated:

I know of no limits to the power of the court to grant a declaration except such limits as it may in its discretion impose upon itself.

(h) The TCC is a creature of statute, namely the Act, and was established under s 85 of the Act with a view to offer the public the service of a cheaper and speedier forum to hear claims relating to consumer claims. Being a statutory forum, the powers afforded to the TCC are therefore confined within the four corners of the Act. The jurisdiction of the TCC is subject to certain limitations prescribed under the Act. Section 3 of the Act defines 'goods' as goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes: (a) goods attached to, or incorporated in, any real or personal property; (b) animals, including fish; (c) vessels and vehicles; (d) utilities; and (e) trees, plants and crops whether on, under or attached to land or not, but does not include choses in action, including negotiable instruments, shares, debentures and money.

(i) The defendant's claim is premised on the subject matter of 'land and building', otherwise known as real property, or realty, that being one unit of single storey intermediate terrace house. The question to be adjudicated before the court now is whether a 'house' amounts to 'goods' as defined in the Act, in particular s 3. If it does not, then the TCC would prospectively be acting ultra vires should it proceed to hear the defendant's case for reason of want of jurisdiction. This exercise will call upon definitions of the words 'goods', 'personal property', 'real property', 'land' etc. and also the canons of construction of the Act.

(j) In applying the canon of construction, namely noscitur a sociis it is evident that the general tenor of the surrounding words and meaning thereof, of the word 'goods' as defined in s 3 of the Act, is that of 'personal chattels' which are consumed in general households eg televisions, cars, telephones—the 'house' itself cannot be regarded as one of those 'goods' for consumption in the 'consumer' sense.

(k) The defendant in pursuing his claim in the TCC is basing his claim pursuant to clauses 17 and 21 of the sale and purchase that being his right to claim for liquidated agreed damages for allegations of late completion and delivery of the 'house' and his right to invoke the defect liability clause. It is the plaintiff's case that these contractual rights of the defendant are in law, a 'chose in action', as opposed to a 'chose in possession'. Section 99 of the Act sets out the limitations of the tribunal's jurisdiction, wherein it provides:

> Except as expressly provided under this Act, the Tribunal shall have no jurisdiction in respect of any claim:
>
> (a) in which there is a dispute concerning:
>
> (i) any chose in action;

(l) It is evident from sections 3 and 99 of the Act that the TCC has no jurisdiction to hear cases in respect of any dispute involving a 'chose in action'.

(m) The phrase 'chose in action' has been judicially considered in some case authorities. In the case of *Re Khoo Kim Hock* [1974] 2 MLJ 29, it was held that:

> The expression 'chose in action' or 'things in action' in the literal sense has been described to mean a thing recoverable by action as contrasted with a chose in possession, namely, a thing of which a person has not only ownership but also actual physical possession. The meaning of the expression has varied from time to time, but it is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession.'

(n) Furthermore, in the case of *United Overseas Bank Limited v Ting Kai Hoon* [1998] 1 LNS 38, it was held that:

> … chose in action means recovering a thing which a person may not have actual physical possession of (Halsbury's Laws (4th Ed) para 1).

(o) That the defendant's rights based on the sale and purchase agreement, in particular clauses 17 and 21 in this instance (being the clauses she has relied on based on her statement of claim before the TCC), are a 'chose in action'. These rights confer the defendant with the right to bring an action to recover compensation for damages. These are things of which the defendant can only claim or enforce by action, eg, rights of proceeding in a court of law to procure damages for compensation, a legal chose of action is a right of action which could only be enforced in a Court of Law. These are also known as incorporeal property. Being an action premised on 'chose in action', by virtue of the exclusionary limb of s 3's definition of 'goods' and also s 99 of the Act, the TCC lacks the jurisdiction to hear the defendant's case. For example, the jurisdiction of the TCC was challenged in the case of *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* [2007] 1 CLJ 300 on the issue whether the disputed transactions (telephone bills) amounted to 'any trade transactions effected by electronic means'. In that case, it was held by the High Court in Melaka that the Tribunal lacked the jurisdiction to hear the case since the disputed transactions are caught within the ambit of the first limb of s 2(2)(g) of the Act.

(p) In comparison, in Peninsular Malaysia, the Tribunal for Homebuyer Claims (hereinafter referred to as 'THC') was established under s 16B of the Housing Developers (Control and Licensing) (Amendment) Act 1966 which came into operation on 1 December 2002. The THC (governed by the Housing Development (Tribunal for Homebuyer Claims Regulations 2002) is empowered to hear claims from the homebuyers against licensed developers. The THC is now only available in Peninsular Malaysia and there is no such

Tribunal in Sarawak to hear the claims from the homebuyers against the licensed developers. Prior to the establishment of the THC in Peninsular Malaysia, homebuyers' claims against the licensed developers could only be filed in the civil court. On the other hand, the TCC established under s 85 of the Act and enacted by Parliament to be applied to all states of Malaysia which came into operation on 15 November 1999. If the TCC also has jurisdiction to hear claims from the homebuyers against the licensed developers, it would be an act of redundancy to establish the THC. Parliament never intended the TCC to have jurisdiction to hear the claim arising from the sale and purchase agreement entered into between the homebuyer and the licensed developer, otherwise there would have been no necessity of the establishment of the THC. In addition none of the provisions in the Act provide the jurisdiction of the TCC to hear the dispute arising from the sale and purchase agreement entered into between the homebuyer and the licensed developer. Since the Act does not provide jurisdiction to the TCC to hear the claims from the homebuyers against licensed developers, the TCC should not act ultra vires and outside its jurisdiction in order to defeat the intention of Parliament.

(q) In the case of *Tribunal Tuntutan Pembeli Rumah v Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617, it was held that:

> To do so would be contrary to a settled principle of law that statutes must be read as a whole (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 CLJ 559). And literal interpretation of a statute is not applicable in all cases. There are circumstances where the nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament (see *Akberdin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2002] 4 CLJ 689; *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305).

(r) It is to be noted in the foregoing case that homebuyers had resorted to the THC, not the TCC, to seek redress. The foregoing case was further affirmed in *Palmerston Holdings Sdn Bhd v Chong Siew Eng* [2007] 7 CLJ 56, where the court held that:

(a) In *Tribunal Tuntutan Pembeli Rumah v Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617, the Court of Appeal through the judgment of Richard Malanjum JCA (now CJ (SS)) had the occasion to consider the housing legislation and enunciated the following principles:

(i) it is a settled principle of law that statutes must be read as a whole, at p 624E (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 CLJ 559);

(ii) there are circumstances where the nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament, at p 624g-h (see *Akberdin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2002] 4 CLJ 689; *SEA Housing Corporation Sdn Bhd,*); and

(iii) the housing legislation is a piece of social legislation and hence its provisions should be given liberal and purposive interpretation ie, to promote the general legislative purpose underlying the provisions (see also s 17A of the Interpretation Acts 1948 and 1967).

(b) On further appeal, *Westcourt Corporation Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* [2004] 4 CLJ 203, the Federal Court through the judgment of Ahmad Fairuz CJ Malaysia approved the Court of Appeal's enunciation of the above principles governing the interpretation of the housing legislation. [*Tan Tian Seng & Anor v Grobina Resorts Sdn Bhd* [2005] 7 CLJ 70].

[5] On the date of hearing of the application I had cautioned the plaintiff that the necessary and interested parties are not named for me to deal with the matter. In this case I take the view that the TCC must be made a party and/or be represented in this proceeding. Any decision given without the hearing of the tribunal will be in breach of the rules of natural justice. The plaintiff insisted and assured me that he had the locus and can proceed to seek the declaratory relief sought. After having read the submission in detail I am of the view that the plaintiff has not made out a case to proceed without naming the TCC. Further, declaratory relief is discretionary relief and not relief which can be sought as of right. Sine qua non for considering declaratory relief is in my view needs the presence of all interested and necessary parties as set out in O 15 r 16 of the RHC as the court deems fit.

[6] The plaintiff's reliance on the views of PW Young in his book on Declaratory Orders is not sufficient to satisfy the threshold requirement before the court can exercise to grant the declaratory relief. The very important principle in my judgment which must be adhered to before declaratory relief can be considered is for the plaintiff to ensure that all necessary and interested parties are before court and only thereafter can the views of PW Young become relevant. The matter does not end there. The plaintiff must also satisfy the requirement set out in the Specific Relief Act 1950 ('the SRA') because the Act specially deals with declaratory orders and decrees. Section 41of the SRA reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[7] Section 41 of the SRA must be read with O 15 r 16 of the RHC which states:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[8] This section and O 15 r 16 of the RHC are patently in conflict. A similar provision as this section and the said order is found in India. In construing those provisions, the Privy Council in *Kathamar Nachiyar v Dorasingha* (1875) 21A 169 has held that the courts in India had no power to make a merely declaratory decree otherwise than under the section.

[9] Under s 41 of the SRA, there is a need to seek 'further relief than a mere declaration' (emphasis added). This is not a requirement under O 15 r 16. Declaratory orders cannot be granted when the strict requirement set out in this section is not satisfied. Our courts have endorsed the criteria set out by PW Young in his book Declaratory Orders (2nd Ed) where he says that the criteria required before there can be a declaratory order is as follows; (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which usually referred to as 'standing' or 'locus standi'; (d) the controversy must be subject to the court's jurisdiction; (e) the defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims; (f) the issue must be ripe, ie, it must not be of academic interest hypothetical or one whose resolution would be of no practical utility.

[10] In light of s 41 of the SRA,the proposition stated by the learned author PW Young cannot be read in isolation. Further, it will appear that the literal reading of O 15 r 16 of the RHC will be ultra vires s 41 of the SRA.

[11] In my view, pure reliance on English authorities and books now (after 50 years of independence) in almost all cases will not reflect our legislative intention and scope of the relevant Acts. In my view less dependence will pave way for independence in the development of law and legal jurisprudence. This is so because many of our legislative provisions are not applicable in England or other jurisdictions in the commonwealth. It is often unnecessary to rely on authorities when the Act and Rules are extremely clear. The plaintiff need only comply with the basic rules and statutory provisions to obtain the relevant relief. It is unnecessary as in this case to place heavy reliance on cases when the Act and Rules for declaratory relief are clear and self explanatory, and the discretion to grant relief is vested in the courts.

[12] For the reasons stated above, notwithstanding there are some merits in the plaintiff's submission, I take the view that the plaintiff has not satisfied the legal and procedural requirements and has taken much of court's time and on the facts of this case it can be said that the plaintiff's application is frivolous, vexatious and an abuse of the process of court. To avert such application, I take the view that the solicitors must be asked to bear the costs as in doing so it will stand as a deterrent for filing an unmeritorious application and this will also be a step to reduce the backlog of cases. It is my judgment that the plaintiff's originating summons must be dismissed with costs to be taxed and paid to the defendant. As the defendant is not before the

court but has been served the learned deputy registrar shall send a copy of this judgment to the defendant and inform her that she is entitled to tax the costs. I hereby order so.

Originating summons dismissed with costs.

Reported by Eugene Daniel Louis